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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 154

CHRISTIAN A. JOHNSON AND CAMERON BIEWEND INDIVIDUALLY AND AS A COMMITTEE OF THE COMMON STOCKHOLDERS OF ELECTRIC POWER AND LIGHT CORPORATION,

Petitioners.

v.

SECURITIES AND EXCHANGE COMMISSION

AND

ELECTRIC POWER AND LIGHT CORPORATION,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PRESS OF GEO. H. DEAN CO., BOSTON

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Petitioners.

v.

SECURITIES AND EXCHANGE COMMISSION

AND

ELECTRIC POWER AND LIGHT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Christian A. Johnson and Cameron Biewend, individually and as a Committee for the common stockholders of Electric Power and Light Corporation (called in this Brief the "Committee") pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Second Circuit (R. 305), which was entered on February 25, 1954, rehearing denied March 23, 1954 (R. 317), affirming that portion of a plan of reorganization approved by the Securi-

ties and Exchange Commission (called herein the "Commission") allowing in part and disallowing in part an Application of the Committee for the allowance of fees and reimbursement of expenses in the reorganization of Electric Power and Light Corporation.

Opinions Below.

The opinion of the Commission below is *In the Matter of Electric Power and Light Corporation* et al. H.C.A.R. No. 11175, decided April 21, 1952 (R. 212a). The District Court's opinion (R. 288a) is unreported and did not discuss the claim of the Committee. The opinion of the United States Court of Appeals for the Second Circuit is *In re Electric Power and Light Corporation* 210 F. 2d. 585, decided February 25, 1954. (R. 305). The opinion of the Commission which approved the original Plan of Reorganization, from which the Applications for fees arose, is *In the Matter of Electric Power & Light Corporation* H.C.A.R. No. 8889 (Unprinted Record, Vol. I, p. 98), March 2, 1949.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 25, 1954, and rehearing denied March 23, 1954. The jurisdiction of the Supreme Court is invoked under Section 11 of the Public Utility Holding Company Act (15 U.S.C. Sec. 79K) and under 28 U.S.C. Secs. 1254 and 2101.

Questions Presented.

The questions presented involve fees of a Committee's expert and counsel for services in connection with a corporate reorganization under the Public Utility Holding Company Act. The Committee was duly organized under the Rules of the Commission; it represented a large propor-

tion of common shareholders, was the sole representative of the common in all aspects of the case and was the sole party opposing the Plan of Reorganization and presenting an alternative Plan. The questions presented are:

1. Whether compensation can be denied, (or, as the case may be, disallowed in all but nominal amount) to such a Committee primarily or solely on the ground that the Committee was unsuccessful in changing the Plan of Reorganization and therefor did not "benefit" the estate or its shareholders.

2. Whether adherence by the Securities and Exchange Commission to the so-called "benefit rule" in passing upon fees of such a Committee is consistent with the "fair and equitable" standard of Section 11 of the Public Utility Holding Company Act.

3. Whether compensation should be allowed to such a Committee where the facts show: (a) that the presentation of the Committee was a competent and reasonable one and raised *bona fide* issues of fact and law and (b) that, many years after consummation of the Plan of Reorganization, the contentions of the Committee have been borne out, whereas the findings of the Commission have proved to be demonstrably in error in nearly all important respects.

Statute Involved.

The provisions of Section 11(e) of the Public Utility Holding Company Act of 1938 (28 U.S.C. Sec. 79K (e)) are set forth in Appendix B.

Statement.

The fees sought by the Committee are for services of its expert witness and counsel arising from a plan of reorganization of Electric Power & Light Corporation which as approved by the Commision resulted in the liquidation of the Company and in the creation of a new Holding Com-

pany System, *In the Matter of Electric Power & Light Corporation* Holding Company Act Release No. 8889 (referred to as "Opinion re Plan") (Unprinted Record Vol. I, p. 98). Briefly summarized, the reorganization affected all classes of stock, which were as follows: (Opinion re Plan, p. 5. Unprinted Record Vol. I, p. 103).

$7.00	Preferred Stock	514,162 shares
$6.00	Preferred Stock	255,430 shares
$7.00	Second Preferred Stock	74,814 shares
	Common Stock	3,453,787 shares
	Warrants	534,754 warrants

The Company's balance sheet showed consolidated assets of $662,000,000. (Opinion re Plan, Unprinted Record, Vol. I, p. 201 Appendix A). The Plan adopted was filed in March 1948, after a prior plan which had been filed proved to be no longer feasible. All classes of senior shareholders and Electric Bond and Share, the parent Company, supported the plan except in certain minor respects (R. 222a). Only the common shareholders opposed the plan. Electric Bond and Share owned 57.23% of the common (R. 256a) but its interests were, by virtue of ownership of other stock and of substantial claims against Electric Power and Light, clearly in conflict with those of the common stock, as the Commission has stated (R. 255a-256a).

Under the circumstances the Johnson-Biewend Committee was the only party in the case opposing all phases of the Plan (R. 222a). Another Committee, the Sincoff Committee, who represented a private group of shareholders, participated in a limited portion of the case involving claims against Electric Bond and Share (R. 222a).

The appellant Committee filed a declaration under Rule U-62 of the Rules and Regulations of the Commission, which

governs and regulates the formation and activities of shareholders' Committees, and was authorized to function by the Commission. The Committee, with the approval of the Commission, solicited authorizations from common shareholders and ultimately represented approximately 400,000 common shares of a total of 1,477,149 shares in the hands of the public (excluding shares held by Electric Bond and Share) (R. 49a). The Committee was therefore the only group which represented a broad segment of publicly-held stock and was the only party representing a portion of the publicly-held common in all aspects of the case. It should be noted that the Commission had evaluated the common stock at $26.65 per share, or, with 3,453,787 shares of common, at approximately 90 million dollars (Opinion re Plan, P. 72 Unprinted Record, Vol. I, P. 170) However, as will be shown, the Commission's estimate is less than one-half of present values. It is therefore not a matter of dispute that the property values represented by this Committee were of considerable magnitude. The plan itself raised a number of questions of law and fact. The major dispute in the case was the proper allocation of securities to the holders of the preferred and common stocks and the option warrants. The latter raised a question of law which was later decided by this Court contrary to the holding of the Second Circuit. *Niagara Hudson v. Leventritt* 340 U.S. 336 (1951). The securities to be allocated consisted of shares of United Gas Corporation and of Middle South Utilities, Inc., which was a new Company organized to hold the common stock of Arkansas Power and Light Company, Louisiana Power and Light Company, Mississippi Power and Light Company and New Orleans Public Service, Inc. Subsidiary questions involved the necessity of creating a holding company, namely Middle South, for these operating companies and the pro-

priety of basing earnings estimates on a single year's budget. The second phase of the case involved the Deep Rock doctrine and the settlement of claims by the Company against Electric Bond and Share. The voluminous findings of the Commission reflected innumerable disputes of law and fact. (Opinion re Plan, Unprinted Record Vol. I, p. 98).

The Committee submitted an alternative Plan of reorganization which was rejected by the Commission. The Committee was unable to convince the Commission that the allocation of securities proposed by the Company was unfair to the common, that the creation of Middle South was unnecessary and that the settlement of claims was unduly low. When the plan was submitted to the District Court for approval and enforcement, the Committee again opposed it. However, that Court held that the Commission's findings were supported by evidence in the record and approved the plan (R. 41a). This plan was upheld by the Second Circuit Court in *In Re Electric Power and Light Corporation,* 176 F. 2d 687, after an application for a stay had been denied by the Circuit Court and the Supreme Court (by a 4-2 vote), *In Re Electric Power and Light Corporation,* 337 U.S. 904.

In December of 1949, after the conclusion of litigation, the Committee filed an Application on behalf of itself and other parties for Reimbursement of Expenses and Allowance of

Fees (R. 47a). The Fees and Expenses named therein were as follows (R. 48a):

	Fee	*Expenses*
Burns, Blake & Rich, Counsel	$35,975.00	$2,770.06
Expenses and Disbursements of the Committee. (This includes $5,000. paid to Becker, Berman & Odell as a fee and $1,049.79 for expenses and $2,734.58 paid to P. Harold Peterson on account.)		16,347.47
Additional Compensation to P. Harold Peterson	9,454.42	

No compensation was asked by appellants Messrs. Johnson and Biewend for their own services.

The Commission adopted the recommendation of the Company and allowed Burns, Blake & Rich only $9,500. instead of $35,975., which was requested, for legal services, plus reimbursement of expenses (R. 242a, 243a, 244a). The fee of P. Harold Peterson, the Committee's expert witness, was denied *in toto* (R. 244a-245a). The expenses of the Committee were allowed, except for payments to Peterson of part of his fee and except for payment of the fee of Becker, Berman & Odell, a New York law firm which had been engaged to represent the Committee before the United States District, Circuit and Supreme Courts (R. 245a, 246a). The District Court approved the Commission's allowance and disallowance of fees and overruled appellants' objections thereto, (R. 268a, 288a, 289a, et seq.). The Second Circuit affirmed (R. 305), and the Committee now seeks review by this petition for certiorari.

Specification of Errors.

The Court of Appeals for the Second Circuit erred:

1. In failing to apply a proper rule of law as applied to Compensation of experts and counsel of the Committee—namely, that allowance of nominal compensation or denial of compensation is not proper where the presentation of the Committee was competent and reasonable and where representation of shareholders was necessary.

2. In holding in effect that the primary basis of compensation of a Committee is its success in change of a Plan and in upholding the Commission's ruling that such success is the sole basis of compensation.

3. In failing to hold that the objections of the Committee made to the District Court should have been allowed. These objections were as follows (R. 286a):

> "1. Objection is made to disallowance by the Securities and Exchange Commission (hereinafter called S.E.C. or Commission) of the following fees for which application has been made to the Commission:
>
> | | *Fee* |
> |---|---|
> | Burns, Blake & Rich (Counsel for Committee) ..... | $26,475.00 |
> | Expenses and Disbursements of the Committee (in payment of $5,000 to Becker, Berman & Odell as a fee and $2,734.58 to P. Harold Peterson on account) ... | 7,734.58 |
> | P. Harold Peterson (Financial Expert for Committee) ..... | 9,454.42 |
>
> "2. Objection is made to the Finding of the Commission that the failure of the Committee to change any part of the Plan of Reorganization of Electric Power & Light Corporation finally approved is sufficient basis for disallowance of the fees of P. Harold Peterson entirely and disallowance of the major share of the fee of Burns, Blake & Rich.

"3. Objection is made to the retroactive change by the Commission of its pronounced policy of granting reasonable fees to committees performing competent work, regardless of any change in the final plan.

"4. Objection is taken to the failure of the Commission to consider the fact that the valuations of the Committee and its expert have now been proved to be substantially correct, while those of the Commission proved to be erroneous.

"5. Objection is taken to the following finding of fact of the Commission, as having no basis in the record:

> "* * * it is significant that the allocation proposals made by the Johnson-Biewend Committee would have resulted in the $7 Preferred Stock receiving securities and cash of a present value of between $85 and $95 in full compensation for their liquidation preference of $189 and the redemption price of $199." (R. 241a).

"6. Objection is taken to the finding that the work of the law firm of Becker, Berman & Odell resulted in duplication of services."

4. In finding that the Committee did not submit a Plan of reorganization to the Commission.

Reasons for Granting the Writ.

This case involves questions, never decided by this Court, and for many years a subject of division in the lower Courts, of importance not only in corporate reorganizations under Section 11 of the Holding Company Act but also in Reorganizations under Chapter X of the Bankruptcy Act (11 U.S.C. Ch. 10, Sec. 642). The problem presented by this case concerns the denial of counsel fees to a duly organized Committee, with wide and large representation among

shareholders, on the ground that the Committee was unable to effect changes in a Plan of Reorganization passed upon by the Securities and Exchange Commission. The question of law was intensely discussed at the time of the enactment of Chapter X of the Bankruptcy Act and the so-called "benefit" requirement was—despite the instant case—apparently rejected by the wording of Chapter X, although a minority of Courts have continued to follow it.

Although the question of the validity of the "benefit rule" is common to Chapter X reorganizations, it also is a problem under Section 11 of the Public Utility Holding Company Act. Section 11 (e) requires that a Plan of Reorganization be "fair and equitable", and the Commission's jurisdiction over fees must conform to this standard. *In Re Electric Bond and Share Co.,* 80F. Supp. 795. It is likely that the status of this rule as finally determined will be the same under both Chapter X and Section 11.

I.

The Commission and the Court below have applied in the case at bar the so-called "Benefit Rule" which conditions compensation either wholly or primarily upon successful litigation.

Certain salient facts stated above must be kept in mind in consideration of the questions of law presented.

First, compensation of the Committee's expert witness Peterson was denied *in toto.* Reimbursement of the Committee for fees paid to New York counsel Becker, Berman and Odell, for work in Court proceedings in the Second

Circuit and the Supreme Court were totally denied.[1] Compensation of its chief counsel Burns, Blake and Rich was allowed in nominal amount only.[2]

Second, the matters upon which the Committee's expert and counsel worked involved securities worth large sums

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[1] The Commission denied reimbursement to the Committee for fees paid to Becker, Berman and Odell on the ground that the latter firm's services were duplicative of the Committee's general counsel, John F. Rich of the firm of Burns, Blake and Rich. The services of Becker, Berman and Odell were in connection with Court proceedings in the District, Circuit and Supreme Courts. The Commission held that since Mr. Rich and Mr. Burns were partners in a law firm in New York, new counsel should not have been engaged. It was conceded that Judge Burns had done only a small amount of work in the case and that Mr. Rich's home and principal office were in Boston. Although the Committee deemed it necessary to engage counsel regularly practising in the Federal Courts in New York, the Commission held that this exercise of discretion was unwarranted and that Rich should have done the work by commuting from Boston to New York for the nominal fees allowed.

Presumably the Commission would not have denied this fee had the Committee been successful in the Courts. Such a ruling, which holds it improper for a Committee to engage a local lawyer familiar with procedures in a distant jurisdiction, is unduly harsh and is in error. This sort of stringent regulation of fees has recently been reversed by the Courts in cases where the Commission has reduced fees for duplication of work or for other reasons. *Standard Gas and Electric Company* v. *S.E.C.,* (C.C.A. 8, decided April 19, 1954.) Federal Securities Law Reporter Current Vol. p. 92,012; *Securities and Exchange Commission* v. *Masterson,* 202 F. 2d. 63, (C.C.A. 3, 1953) cert. denied 346 U.S. 818.

[2] The fee of Burns, Blake and Rich was $9,500. for total work of about 1800 hours (R. 242a) — a little over a year's work. This represents a fee of $5.29 an hour for this vital corporate work. After deducting office overhead costs (which would include secretary of $2.00 an hour, rent of at least $1.00 an hour, library, research assistance and other expense), the fee could not have amounted to $50.00 a week, if indeed it exceeded office costs. That this fee is nominal and far below usual standards of compensation for such work is obvious from the other fees approved below by the Commission — e.g. to Simpson, Thacher and Bartlett (R. 259a, 260a) $50 an hour; to Cahill-Gordon, Zachry and Reindl (R. 228a-230a) $34 an hour; and to Percival E. Jackson (R. 234a-237a) $28 an hour. These fees totaled respectively $35,000., $207,000. and $140,000.

of money. The interest of the common shareholders was found by the Commission to be worth over 90 million dollars, (Statement of Case, P. 5) and, as will be demonstrated, would now be worth about 180 million dollars.

Third, the Committee was the only party representing publicly held common stock or presenting a plan in its behalf, and the stock represented was a significant portion of the publicly held common.

Fourth, all classes of stockholders were in substantial support of the Plan except the common shareholders. As finally approved, the Plan was unfavorable to the common stock. (See *Sixth* below.) The Committee was the sole party to propose an alternative Plan.

Fifth, were it not for the activities of the Commission the common shareholders would have been unrepresented in consideration of the major phases of the Plan.

Sixth, the contentions of the Committee, although rejected by the Commission, have, many years after the consummation of the Plan, proved to be almost entirely correct, whereas the evaluation approved by the Commission has been in error and has resulted in a loss to the common stock of nearly one hundred million dollars. Although it is not deemed necessary to complicate this petition by submission of detailed computations, the result of the Commission's error in approving the Plan (which error must certainly rank as one of the most serious miscalculations ever made by the Commission) is shown for the Court's convenience by figures in Appendix A. These figures are current adjustments of figures submitted to both the District and Circuit Courts below. The accuracy of figures previously presented has never been challenged by the Commission. *These figures show that the Commission un-*

dervalued the equity of the common stock by about 90 million dollars and that the participation of the common stock should have been doubled by the Plan. The Committee pointed out to both the District and Circuit Courts that the Plan of Reorganization failed for the very reasons pressed by the Committee in opposition to the Plan and expressly rejected by the Commission. However, the Circuit Court did not consider whether the Committee's analysis was sound. The Court assumed *arguendo* that the Commission's approval of the Plan was a mistake but nevertheless dismissed the Committee's contention with the following odd conclusion, which begs the issue:

> "It is common knowledge that an intelligent estimate may turn out to be less accurate than an uninformed guess, and a comparatively higher ultimate accuracy of a rejected forcast does not necessarily show that it was a contribution of any recognizable value at the time it was made available". (R. 311).

The Court below therefor made no inquiry as to whether the Plan had failed for the reasons prophesied by the Committee or as to whether the failure of the Plan was due to fallacies in Commission analysis rather than those of the Committee. The Court made no inquiry as to whether the Committee's presentation was a reasonable and competent one.

The Committee had pointed out to the Circuit Court that its own plan of reorganization and the estimates of its expert witness Peterson, had been borne out by supervening events as fair and equitable. The Commission had made findings to the contrary (R. 241a) but its finding was the result of an arithmetic error (never denied by the Commission before the Courts). The Circuit Court compounded this error by stating that the Committee had never filed

a Plan for Reorganization! (R. 311). The Court did not correct this error even after it was called to its attention upon petition for rehearing (R. 314).

It is apparent in view of the foregoing that the Commission placed its disallowance of compensation almost entirely on the failure of the Committee to persuade the Commission to change the Plan of Reorganization.

Indeed, the Commission by express language adopted the so-called "benefit rule" in its opinion. In that portion of its opinion pertaining generally to fees, the Commission stated that the benefit conferred is the "primary factor" in allowance of compensation (R. 223a). This indeed was the view of the Second Circuit Court (R. 312). However, the Commission took an even more extreme view in discussing fees of the Committee's Counsel Burns, Blake and Rich. The Commission stated: (R. 243a).

> "Our allowance cannot be based upon the number of recorded hours of time attributed by counsel to the case. Efforts productive of significant results may occupy only a few hours, while on the other hand many days may be spent to no avail. *We can charge the estate only for the measure of benefit conferred upon it*" (Emphasis Supplied).

The language above clearly adopts the "benefit rule." Both the Commission and the Court have strayed far from applying a rule of law that would establish the reasonableness and competence of the Committee presentation and the necessity of stockholder representation as the primary basis of compensation.

II.

This Case, in adopting the "Benefit Rule" is in conflict with other Judicial and Administrative Precedents and is unsound.

The application of the "benefit rule" by the Commission in this case reflects a reversal of a long established position of the Securities and Exchange Commission. The new doctrine or approach of the Commission emphasizes the present state of uncertainty in the Courts. Although the Second Circuit Court has affirmed the Commission in the present case, its judgment is in conflict with a great many cases or precedents as shown by the following:

1. *In the Matter of Engineers Public Service Company* decided Nov. 30, 1953, 116 F. Supp. 930 (D.C. Del. 1953) (Appeal filed by the Commission to the Court of Appeals for the Third Circuit) has rejected the adoption of the "Benefit" Rule under the Holding Company Act. The *Engineers* case is very similar to the instant case. The applicants were attorneys representing common shareholders and had appeared after the management had acquiesced in a new plan by the Commission. Although the applicants successfully opposed the new plan in the lower courts, the United States Supreme Court finally upheld the Commission. *S.E.C. v. Central Illinois Corp.* 338 U.S. 96. Upon remand, the Commission refused to allow compensation to the applicants on the ground that no benefit had been conferred. Before Judge Leahy, who as Distrct Court Judge sitting in Delaware has passed upon a very significant percentage of all reorganization plans approved by the Commission, the Commission took the flat position that the applicants did not have the right "to require (all) common stockholders to pay for the minority's objections when it turns out that despite their good faith, despite their

reasons for believing that they were right, they were in fact wrong and the management which the common stockholders had elected was in fact right". Judge Leahy in a thoroughly documented and able opinion, rejected the Commission's position. He stated that it was "at loggerheads with previously announced principles governing allowances of compensation in reorganization under the Holding Company Act." (116 F. Supp. at 935). He further noted that the Commission's position is contrary to the prevailing view as stated in legal texts on Bankruptcy and to the Commission's own position on the matter in its reports to Congress.

2. *Conflict with established precedents before and after the enactment of Chapter X of the Bankruptcy Act including cases in various Circuit Courts.*

Collier on Bankruptcy states that compensation may be allowed to a Committee for reasonable though fruitless efforts in opposing a Plan or Reorganization. (*Collier on Bankruptcy,* 14th ed., Vol. 6, pp. 4507-8):

> "In addition, activities which benefit the estate are not to be restricted merely to those which relate to the successful consummation of a phase, as was largely the case under Section 77B. Activities relating to opposition to a plan, *either successful or unsuccessful,* are entitled to an allowance under Chapter X. This serves to insure the vigorous representation of all security holders and the protection of minority groups". (Emphasis supplied). . . ."

Again at p. 4537, Collier states:

> "Nevertheless, one thing should be clearly understood, and that is that activities in opposition to a plan *whether they are unsuccessful or successful* may be entitled to an allowance just as well as activities in support of the plan."

The question of compensation of counsel under the Bankruptcy Act is identical to that under the Public Utility Holding Company Act since there is a common objective of a "fair and equitable" plan. In *Heenehan v. Prudence Realization Corp.* 108F. 2d 103 (C.C.A. 2, 1940), the Second Circuit took a position contrary to its present position (although Judge Chase, who rendered the opinion in the case at bar, dissented in the *Heenehan* case and therefor remains consistent in his view that the "benefit" requirement is proper). In *Heenehan,* counsel had raised a question of constitutional law in a reorganization and had been overruled. The Second Circuit held that the question raised was a reasonable one and therefor merited compensation even though it had been pressed unsuccessfully. Judge Chase rendered a dissent (which seems to sum up his present position) in which he stated ". . . . it would be idle to suggest that the statute contemplates allowances for all such or for those attorneys who may by their services have helped to clarify the law. Where reliance must be only upon the general statutory provision, *the test should be one of benefit to the estate"* (Emphasis added). Cases which have rejected the "benefit rule" are *Milbank, Tweed & Hope v. McCue.* 111 F. 2d. 100 (C.C.A. 4, 1940) and *Smith v. Central Trust Co.* 139 F. 2d 733 (C.C.A. 4, 1944). To the same effect is *In re Inland Gas Corp.* 73 F. Supp. 785 and In re *N.Y. and H.R. CO.,* 46F. Supp. 214, 234. In the latter case Judge Hincks stated:

> "To be sure, their effort to develop a plan which should recognize some equity for the old stockholders proved unsuccessful. Nevertheless, lack of success in advocacy on such an issue is a factor affecting the amount rather than the propriety of compensation".

The above cases are in conflict with *Cook v. Bowerock* 122 F. 2d. 977 (C.C.A. 8, 1941) and the case at bar as

well as other decisions which cling to the outmoded concept of benefit. *Ritchie v. Flour Mills of America* 122 F. 2d. 986 (C.C.A. 8, 1941); *Watters v. Hamilton Gas Co.* 29 F. Supp. 436 (S.D.W.Va.) aff'd in part and reversed in part, 111 F. 2d. 100 (C.C.A, 4, 1940). These cases have been termed by Collier on Bankruptcy (Vol. 6, p. 4538, Footnote 30) as "erroneous".

3. *Prior Holdings of the Securities and Exchange Commission.* The Securities and Exchange Commission has vigorously opposed the "benefit" rule in the past, and contrary to its present position has correctly argued that the "benefit" rule is unsound.

In order to demonstrate the anomaly of the Commission's position on the "benefit" rule, it is necessary to review the background of the work of Committees in Bankruptcy cases prior to Chapter X. As noted by Collier, (Vol. 6, p. 4537 et. seq.) there grew up under the decisions before Chapter X the theory that benefit to the estate generally meant activities which related to the successful consummation of a plan. However, as noted, the Second Circuit had taken the contrary view in *Heenehan v. Prudence Realization Corporation* 108 F. 2d 103, (C.C.A 2, 1940).

The Commission took the position before Congress that this rule was entirely unsound, for the rule tended to discourage representation of public shareholder groups in reorganizations. Indeed, the Commission wrote what appeared to be an epitaph for the "benefit" rule when it condemned it unequivocably as one that "set up a punitive ideal that had no necessary relation to the realities of reorganization". *S.E.C. Reports on the study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees,* Vol. VIII (1940) P. 249. See also discussion at p. 249, et. seq. In-

deed, as a result of the Commission's pioneering, Section 242 of Chapter X of the Bankruptcy Act (11 U.S.C. Ch. 10, Sec. 642) was amended to provide that fees may be allowed "in connection with a plan approved by the Judge, whether or not accepted by creditors and stockholders or finally affirmed by the Judge. . . . ."

In the Engineer's case, Judge Leahy notes that the Commission is forthright in urging the "benefit" rule. The Commission stated in its brief that it never intended to "urge the abrogation of the general rule against compensating persons for non-beneficial services". That this is contrary to previous contentions made to the Courts and in its own decisions is pointed out by Judge Leahy. (See *In the Matter of Engineers Public Service Company,* 116 F. Supp. 930 at 935). The Commission took a contrary position in the following cases: *In re Northern American Light & Power Co.* 101 F. Supp. 931, at p. 933; *In The Matter of New England Power Association* H.C.A.R. No. 8751, December 27, 1945; *In the Matter of Midland Utilities Company* H.C.A.R. No. 8982. *Smith v. Central Trust Co.* 139 F. 2d. 733 (C.C.A. 4, 1944), *In re Inland Gas Corporation* 73 F. Supp. 785; *In the Matter of Philadelphia and Reading Coal & Iron Co.* 61 F. Supp. 120.

The reason for the amendment of the Bankruptcy Act and for the position formerly pressed by the Commission must be found in the mechanics of the Committee function in reorganizations and can be illustrated by the facts of the instant case.

A reorganization under Section 11 or Chapter X is always a long and intricate proceeding. Litigation often lasts for several years and results in bulky records of thousands of pages and hundreds of exhibits. For example, the record in this case dealing solely with the last plan filed was about six thousand pages long. There were several hundred ex-

hibits, nearly all containing financial statistics. Personnel must be highly trained and expenses of litigation are very high. The ordinary shareholder has not the wherewithal to be represented even though he may have an important financial stake in the outcome. It is for this reason that the highest public policy is reflected by the creation and participation of committees which represent and communicate with large numbers of shareholders. Both the Commission and Reorganization Courts have in the past welcomed the activity of Committees in order that all points of view shall be presented. To call the Committees volunteers is to do them an injustice, for it is unlikely that reorganization tribunals could properly function without the help of Committees. Members of these Committees functioning under the Holding Company Act are held to the highest fiduciary duties by the Commission, (Rule U-62, Holding Company Act Regulations, CCH Federal Securities Law Reporter, Col. 3, Par. 38, 724). Any policy in regard to allowance of fees that requires personnel to gamble all or nothing on reaching a correct result must seriously discourage shareholder participation. The logical result of the new severe policy of the Commission is to divest large groups of shareholders of representation.

III.

The Importance of the Question before the Court.

The status of the "Benefit Rule" should now be determined by this Court. Despite a somewhat battered history, it has nevertheless refused to die. As resurrected by the Commission, it will discourage representation of publicly held shares in reorganizations. It tends to concentrate power over reorganizations in the Company, in parent holding companies and in holders of large blocs of shares,

who in many cases will be in no position to press the interests of small shareholders or of widely held issues. In cases of such complexity as corporate reorganizations, such procedure can only hamper the effectiveness of the Commission itself in determining what is a fair and equitable plan. The point has been persuasively stated as follows:

> "Under former Sec. 77B the theory grew up that 'benefit to the estate' generally meant activities which related to the successful consummation of a plan. But opposition to a plan, even though unsuccessful, may be both desirable and beneficial, and aggressive action by minority groups is sometimes necessary against entrenched interests who wish to dominate the reorganization for their own advantage." (Emphasis added). Collier on Bankruptcy, Vol. 6, p. 4537.

It is submitted that a proper rule will give due regard to the importance of ensuring adequate representation of all classes of publicly held shares. Furthermore, the "benefit rule" marks an attempted return to unprofessional standards, putting the Committee attorney and expert in the position of working for contingent fees. The rationale of the rule—namely that the work of professional men is of little or no value unless the patient is cured or the case won—is outmoded and inducive of inferior professional standards.

Conclusion.

It is submitted that this case presents an important question of Federal law which has been applied inconsistently by the Circuit Courts and the Commission itself. For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix A

The following figures, except as adjusted for change of current values, were submitted to the Courts below. The figures previously submitted have never been challenged by the Commission. They demonstrate that the approval of the Plan or Reorganization of Electric Power and Light Corporation unfortunately demolished a large portion of the value of the common shareholders equity in the company. The figures below are derived from prices quoted on the New York Stock Exchange of which the Second Circuit takes judicial notice, *Park & Tilford* v. *Schulte* 160F 2d. 984, 990.

The Plan of Reorganization provided for the following allocations of securities to each share of the preferred stocks (Opinion re Plan, p. 7 Unprinted Record, Vol. I, p. 105):

$7 Preferred Stock	6.5 shares of United Gas Corp.
	4.5 shares of Middle South Utilities
$6 Preferred Stock	5.9 shares of United Gas Corp.
	4.1 shares of Middle South Utilities
$7 Second Preferred Stock	6.25 shares of United Gas Corp.
	4.3 shares of Middle South

Current quotations on the New York Stock Exchange show that United Gas Corporation and Middle South Utilities are selling at about the same price as that prevailing at the time of the Committee's petition for rehearing to the Court below. United is selling for about $30.00 per share and Middle South for about $28.00 per share. (See, for example, quotations in New York Times, Sunday, June 13, 1954).

In the following table are listed the total claims of the various Preferred Stocks, the valuation of them by the Commission and the present range of error of the Commission.

	(Total Claim Liquidation and Redemption Values)	*Valuation of Claim Adopted by Commission*
$7 Preferred	$189.71 and $199.71	$185.00
$6 Preferred	$176.90 and $186.90	171.00
2nd Preferred	$212.00 and $217.00	185.00

	Present Value of Securities Allocated, Per Share
$7 Preferred	$321.
$6 Preferred	$291.
2nd Preferred	$307.9

	Range of Error Per Share in Valuation	*Approx. total range of Error in Valuation*
$7 Preferred (514,162 shares)	$120 to $136!	$61,700,000 - $69,900,000
$6 Preferred (225,430 shares)	$104 to $120!	$23,445,000 - $27,100,000
2nd Preferred (74,814 shares)	$ 91 to $123!	$ 6,800,000 - $ 9,200,000
	Total error	$91,945,000 - 106,200,000

It is therefor apparent that the preferred stocks received from 90 to 105 million dollars in excess of their claims. This was all at the expense of the common stock and the stock warrants (which represent a very small percentage of equity); it is clear that the allocation to the common stock should have been doubled and was inadequate by 90 to 105 million dollars.

Although it is not the function of this Appendix or Brief to analyze fully the results of the plan, nevertheless, if review of this case were to be granted, the Committee would point out to this Court the following:

1. The Plan proposed by the Committee and rejected as unfair by the Commission has proved to the

fairest presented and strikingly close to actual performance.

2. The analyses of Peterson and the Committee, rejected in detail by the Commission in its opinion approving the plan, have unquestionably been proved to be sound.

3. The Commission's method of evaluation and the evaluations themselves have been completely incorrect.

Appendix B

PUBLIC UTILITY HOLDING COMPANY ACT—SECTION 11(e)

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate, the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the Company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 154

CHRISTIAN A. JOHNSON AND CAMERON BIEWEND INDIVIDUALLY AND AS A COMMITTEE OF THE COMMON STOCKHOLDERS OF ELECTRIC POWER AND LIGHT CORPORATION,

Petitioners.

v.

SECURITIES AND EXCHANGE COMMISSION

AND

ELECTRIC POWER AND LIGHT CORPORATION,

Petitioners.

1. No extended comment is necessary in regard to the Brief of Electric Power & Light. This Brief contends that the standards for compensation of committees are factual matters and are not a subject of conflict in the Courts. Since the Brief of the Commission (Page 10) frankly concedes that the application of the concept of benefit "has produced dispute in the courts," we turn to the latter Brief.

2. One question raised by the Brief of the Respondent Securities and Exchange Commission requires clarification. On page 10 of its Brief, the Commission states as follows:

> "The more restrictive concept of 'benefit' as excluding any compensation at all for unsuccessful activities in opposition to a plan has produced dispute in the courts,

> but is not involved in this case. The general concept that compensation must be measured primarily by benefit to the estate is embodied in most of the authorities cited by the petitioners".

The Commission then cites *Collier on Bankruptcy, In re Engineers Public Service Company* 116 F. Supp. 930 (D. Del., 1953) and *Heenehan* v. *Prudence Realization Corp.* 108 F. 2d 103 (C.C.A. 2, 1940) as authority that "benefit" is generally accepted as the primary criterion of compensation. The Commission argues that the sole question which "has produced dispute in the courts" is whether compensation can be completely denied to Committees where activities in opposition to a plan have been unsuccessful. The Commission argues that there is no difference of opinion in the Courts as to the requirement of "Benefit" where total compensation is not denied.

The Commission's position is misleading. The word "benefit" as used in cases involving compensation in reorganizations can have two distinct meanings, which are very often confused with each other. One meaning refers to the measure of success in opposing or supporting a Plan of Reorganization. A second meaning refers to the "benefit" resulting from competent and reasonable presentation of *bona fide* questions of law and fact. It is the latter sense in which Collier's treatise expressly uses the term:

> "Under former Sec. 77B the theory grew up that 'benefit to the estate' generally meant activities which related to the successful consummation of a plan. But opposition to a plan, even though unsuccessful, may be both desirable and beneficial, and aggressive action by minority groups is sometimes necessary against entrenched interests who wish to dominate the reorganization for their own advantage." Collier on Bankruptcy, Vol. 6, p. 4537.

However, as pointed out by petitioners brief, the Commission has used the term "benefit" to require an advantageous

change in a Plan of Reorganization. Petitioners' Brief was addressed to the impropriety of this so-called "Benefit Rule". The Commission's position is clearly demonstrated by *In re Engineers Public Service Company* 116 F. Supp. 930 (D. Del. 1953) in which the Commission unsuccessfully sought to deny all compensation to counsel for loss of a *bona fide* appeal. It is odd that the Commission (on page 11 of its Brief) cites the *Engineers* and *Heenehan* cases as authorities for its position. These cases both held that compensation should be granted irrespective of success in litigation where *bona fide* issues were raised. The Commission then states that these authorities "accept the view applied by the Commission in this case"—namely that compensation to Committees is appropriate even where there is no success in litigation. However, the Commission is now appealing the *Engineers* case and has taken the unequivocal position in that case that no compensation should be granted for unsuccessful litigation. (*In re Engineers Public Service Company 116 F. Supp. 930 at 934*). Thus, the Commission cites a case and a point of law favorably here, while it fights both the case and the point of law tooth and nail in another court. Such inconsistency is, to say the least, unusual.

The Commission's brief states that there is a conflict in the Courts as to whether *all* rather than *some* compensation can be forfeited as a result of unsuccessful activities in respect to a plan. It further argues, with considerable ingenuity, that since *some* compensation was granted petitioners, the present dispute in the Courts is not involved in this case. Actually, the compensation granted to petitioners was nominal, and was therefor in effect denied.[1] The Commission's argument is therefor irrelevant. But in any event, careful analysis of the Commission's point discloses

[1]The Commission's brief (Page 7) states that $21,000. was paid to petitioners, but does not mention that $11,500. were committee disbursements and that their allowance was never a matter of dispute. Only $9,500. was paid to cover fees of the Committee, and as noted this sum barely, if at all, covered overhead costs.

that the Commission is really taking the position that unsuccessful activity in opposition to a plan is not a "benefit" and hence not compensable in any appreciable amount. Its position is therefor, a restatement of the outmoded Rule, (referred to as the "Benefit Rule" in Petitioners' Brief), which was generally accepted prior to Chapter X, and which is unsound.

The Commission seeks to persuade this Court that, although the Commission does not favor any compensation for unsuccessful litigation, nevertheless it did grant some compensation in this case and therefor petitioners have not been harmed by the Commission's inconsistent application of its own rule. The fact of the matter is that the Commission's present policy virtually denies compensation to all unsuccessful litigants on the ground that they have not conferred a "benefit" on the estate. If the Commission has thereby applied improper legal standards, it has done so whether or not it allows a modest compensation, nominal compensation, or none at all. It is abundantly clear from both Briefs that there is a broad dispute in the Courts as to the proper criterion of compensation of Committees and that this question has long been ripe for final determination. It is squarely at issue in the instant case.

Respectfully Submitted

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ERRATA NOTICE

1). Page 12 of Petitioners' Brief. In the first line of the paragraph entitled *Fifth,* the word "Commission" should be changed to "Committee".

2). The quotation from Judge Hincks' opinion cited on page 17 is to be found in the Record on Appeal in *Manhattan Co.* v. *N. Y., N. H. & H. R. Co.* 171 F. 2d 482 (C.C.A. 2d, 1948) rather than at the indicated citation. Judge Hincks took essentially the same position in the opinion cited in the Brief (*In re New York, N. H. & H. R. Co.,* 46 F. Supp. 214, 234 (D. Conn. 1942) where he stated:

> "And so, even services in conducting litigation which results unsuccessfully are entitled to compensation at a rate which will subject counsel to no positive hardship".

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No. 154

CHRISTIAN A. JOHNSON AND CAMERON BIEWEND INDIVIDUALLY AND AS A COMMITTEE OF THE COMMON STOCKHOLDERS OF ELECTRIC POWER & LIGHT CORPORATION, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION
AND
ELECTRIC POWER & LIGHT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 288-289) was entered on December 23, 1952, and has not

been reported. The opinion of the Court of Appeals (R. 305-312) is reported in 210 F. 2d 585.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1954 (R. 313); rehearing was denied March 23, 1954 (R. 317). The petition for a writ of certiorari was filed on June 21, 1954. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 and 2101, and 15 U.S.C. 79k.

QUESTION PRESENTED

Whether a committee of common stockholders which unsuccessfully opposed a plan of a registered holding company for compliance with Section 11 of the Public Utility Holding Company Act of 1935 is entitled as a matter of law to receive larger compensation from the estate than the amounts allowed by the Commission and approved by the courts below.

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 are set forth in Appendix B of the petition.

STATEMENT

This petition involves an evaluation of petitioners' services by the Securities and Exchange Commission in a proceeding for the reorganization of Electric Power & Light Corporation ("Electric"), a registered holding company, pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935. Petitioners constituted one of three groups representing public holders of common stock of Electric (R. 217). They applied for

an order requiring Electric to pay fees and expenses aggregating approximately $65,000. The Commission allowed approximately $21,000, and denied the balance (R. 268-269). The decision of the Commission was enforced by the United States District Court for the Southern District of New York (R. 289-292), and in this respect the court below affirmed (R. 313).[1]

The plan provided that Electric would

> pay such fees and expenses as the COMMISSION shall find it appropriate for ELECTRIC to pay and as shall have been approved for payment by ELECTRIC by order of the COMMISSION or, in the event of judicial review, by final judgment of the court. (R. 35)

The plan was approved by order of the Commission dated March 7, 1949 (R. 36-41), subject to a specific reservation of jurisdiction "to determine the reasonableness and appropriate allocation of all fees and expenses and other remuneration incurred or to be incurred in connection with the said Plan, as amended, and the transactions incident thereto," other than certain fees separately approved as part of the plan (R. 38).

The plan was enforced by order of the United

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[1] The court below reversed the decisions of the District Court and the Commission with respect to a fee which Electric Bond and Share Company ("Bond and Share"), Electric's parent, proposed to pay to another claimant, holding that the Commission was without jurisdiction to pass upon fees payable by the parent of the company in reorganization. On that jurisdictional issue the Commission has petitioned for certiorari. *S.E.C.* v. *Drexel & Company,* No. 153.

States District Court for the Southern District of New York (R. 301, Item 15),[2] which was affirmed on appeal. *In re Electric Power & Light Corporation,* 176 F. 2d 687 (C.A. 2), stay denied, 337 U.S. 903.

During the years 1945-48, Bond and Share and Electric submitted to the Commission, pursuant to Section 11(e) of the Act, plans for the dissolution of Electric to comply with Section 11(b)(2) of the Act and with an order of the Commission thereunder dated August 22, 1942. *Electric Bond and Share Company,* 11 S.E.C. 1146, Holding Company Act Release No. 3750, affirmed, *American Power & Light Co.* v. *S.E.C.,* 141 F. 2d 606 (C.A. 1), affirmed, 329 U.S. 90. The plan ultimately approved and consummated was filed by Electric in March 1948 (R. 4-28), and was amended in March 1949 (R. 34-35).

Petitioners organized themselves as a committee in April 1948 (R. 48), and thereafter opposed the plan before the Commission and in court (R. 239-246). They filed counter proposals which in effect constituted their own plan (R. 240-241; R. 300, item 9, p. 93). Another committee for the common stockholders of Electric, the Sincoff Committee, appeared in the proceedings at about the same time to oppose the company's plan (R. 242). Petitioners

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[2] This reference is to a stipulation as to the contents of the record on appeal in the court below. Not all of the stipulated record was printed there, nor is it all printed in the record before this Court. The entire record before the court below has been transmitted to the Clerk of this Court and is available for reference.

opposed primarily the allocation ratios proposed in the plan; the Sincoff Committee took the leading role in opposing the proposed settlement of claims against associate companies (R. 246-247).

A third group of public holders of the common stock appeared in support of the plan (R. 250). A preferred stock committee, an individual preferred stockholder, and two groups of second preferred stockholders also participated in the proceeding, as did Bond and Share whose primary interest was in the common stock (R. 216, 220-221).

The only change in allocations after the filing of the plan in March 1948 was a relatively minor increase in the allocation to the second preferred stock (R. 34-35). Every contention of the petitioner Committee was completely rejected by the Commission and by the courts which reviewed the Commission's decision (R. 243). The one witness produced by the Committee merely supplied fallacious analyses of company figures, and unrealistic projections of system earnings (R. 240, 244-245).

During the Commission proceedings in Washington, petitioners were represented by Burns, Blake & Rich, a Boston firm (R. 242-244). Burns and other members of the firm were members of the New York bar, and the firm maintained an office in New York (R. 245). About 40% of their time was devoted to the case after the close of the Commission proceedings (R. 243). Nevertheless, in connection with the court proceedings in New York petitioners retained additional counsel (R. 245). As stated above, petitioners' objections to court en-

forcement were wholly rejected and the enforcement order was affirmed on appeal.

After consummation of the plan, applications for allowances were filed pursuant to the plan, and were considered by the Commission pursuant to its reserved jurisdiction. The amounts sought aggregated $1,320,000 including the $65,000 sought by petitioners (R. 217). The Commission approved and directed the payment of approximately $590,000 by Electric (including $21,000 to petitioners) and $250,000 by Bond and Share (R. 268-269). The allowance to petitioners included a fee of $9,500 to Burns, Blake & Rich; expenses of Burns, Blake & Rich in the amount of $2,770.06; expenses of additional counsel in the amount of $1,049.79; and other committee expenses of $7,563.10. No allowance was made for a fee for the additional counsel retained, or for the witness produced. The Sincoff Committee was allowed $9,500 for a counsel fee, $1,500 for a financial consultant, and $2,037.37 for other expenses. No allowance was approved for the group of common stockholders that supported the plan.

ARGUMENT

1. The decision below does not involve any issue of law on which further review would be appropriate. The restrictive "benefit rule" which petitioners claim was applied would have resulted in denial of any claim of petitioners and other common stock representatives, since there was no tangible benefit to the common stockholders and no change in the plan as a result of their wholly

unsuccessful participation in the reorganization proceedings before the Commission and in the courts. In fact, the Commission authorized and directed payment of approximately $35,000 to common stock representatives, of which petitioners received $21,000.

2. The standards applied by the Commission are set forth in its Findings and Opinion (R. 223-228). The Commission there stated its major objective "to protect estates in reorganization from exorbitant charges and at the same time grant fair compensation to those participating in the proceedings so as to afford adequate public representation in the reorganization process" (R. 223). The Commission went on to state:

> Compensation may be paid for services which have contributed to the plan ultimately approved, which have contributed to the defeat of a proposed plan found to be unsatisfactory, or which have otherwise directly and materially contributed to the development of the proceedings with respect to the plan. In determining the amount of compensation to be allowed, the primary factor is the amount of benefit conferred upon the estate or its security holders by the services rendered. Among other factors to be considered are the necessity of the services, duplication of efforts, the intricacy and magnitude of the problems involved, the time necessarily required to be expended, the experience and ability of applicants, the size of the estate and its ability to

> pay, conflicts of interest, the extent to which the applicant's efforts were directed to or motivated by personal or special interests, and the extent to which the applicant's efforts unreasonably delayed or were deterimental to the proceedings.

The standards are applied in the Commission's discussion of the services rendered by the petitioners (R. 239-244). The Commission discussed the positions taken and evidence introduced by them, the desirability of having the public common stockholders of Electric represented independently of Bond and Share, and the fact that two independent committees for public common stockholders had appeared in the proceedings at substantially the same time. The Commission went on to state:

> Since neither of these committees was successful, we believe that any compensation to either committee not only must depend on whether the committee functioned efficiently, and properly and diligently represented the interest of its class, but also must reflect the consideration that the aggregate compensation for independent representation, not resulting in any tangible benefit to the class, must be modest.

The allowances to Burns, Blake & Rich for a fee, and the reimbursement of the expenses incurred by that firm, were held to be "appropriate compensation in the light of the failure to achieve any sub-

stantive results, bearing in mind the size of the estate and the complexity of the problems involved" (R. 243).

The Commission found that the analyses and testimony of the petitioners' expert witness "did not in any way aid the Commission, and that such services were not essential or even useful to the protection of the interests of the common stockholders. While we believe it proper that a Committee avail itself of the services of an independent expert, it is also our view that the estate should not be saddled with the payment of any fee for computations which, however complex, are based upon fallacious analytical foundations." (R. 244-245). The Commission also found that petitioners' retention of additional counsel after the conclusion of the administrative proceedings "necessarily entailed a great deal of duplicative work for which we do not believe the estate can properly be charged." Accordingly, the Commission allowed only the expenses incurred by the witness and by the additional counsel, but refused to require the estate to pay fees for such useless and duplicative services (R. 245, 246).

The District Court, in overruling petitioners' objections to the Commission allowances, found and concluded that the Commission's findings of fact and conclusions of law were "supported by substantial evidence and were arrived at in accordance with legal standards." (R. 291.) The court below agreed with the District Court in this respect (R. 310-312).

3. The petition seeks to convert an issue as to value of services into a question of law by confusing several conflicting concepts under the phrase "benefit rule". The more restrictive concept of "benefit" as excluding any compensation at all for unsuccessful activities in opposition to a plan has produced dispute in the courts, but is not involved in this case. The general concept that compensation must be measured primarily by benefit to the estate is embodied in most of the authorities cited by the petitioners.

For example, the petitioners' first quotation from Collier on *Bankruptcy* (Petition, p. 16) is preceded by the statement in the same paragraph (Collier on *Bankruptcy,* 14th Ed., Vol. 6, p. 4506) that

> The principal test, however, is the benefit to the debtor's estate and the security holders generally.

The petitioners' other quotation from Collier (Petition, p. 16) is immediately preceded by the statement (p. 4537):

> Here again, however, no allowance will be made unless the services or costs have resulted in some "benefit to the estate."

In re Engineers Public Service Company, 116 F. Supp. 930 (D. Del., 1953), appeal pending, cited at pages 15-16 and 19 of the petition, involves a total denial by the Commission of compensation and reimbursement of expenses for unsuccessful court

litigation by counsel who had not participated in the proceedings prior to the Commission's decision on the plan. The District Court there held (116 F. Supp. at 938):

> Under the authorities, I conclude benefit has been conferred upon the estate within the purview of the Act.

Similarly, in *Heenehan* v. *Prudence Realization Corp.*, 108 F. 2d 103, 104 (C.A. 2, 1940), the court states:

> * * * all that we now decide is that if the Superintendent's appeal was a benefit to the estate, the judge had power to make a commensurate allowance for the services rendered.

In short, these authorities do not reject the view of the Commission and of the courts below that the primary factor in determining the amount of compensation to be allowed is the amount of benefit conferred upon the estate or its security holders by the services rendered. Rather, they accept the view applied by the Commission in this case, that modest compensation may be allowed for the proper and diligent representation of the interest of a class, though unsuccessful in changing the plan.

4. The petition's discussion of the testimony of the witness who was allowed his expenses but no fee is misleading as well as irrelevant. The testimony he gave is not printed in the record, but is accurately described in the Commission's Findings

and Opinion (R. 240, 244-245). The projections of earnings to which his testimony was principally devoted were based upon analytical fallacies and have not been borne out by subsequent events. The changes in market values since consummation of the plan do not support his testimony or his conclusions, and would be irrelevant even if the fairness of the plan were to be reconsidered five years after its approval and consummation. Cf. *S. E. C.* v. *Central-Illinois Securities Corp.,* 338 U. S. 96, 148.

The petition notes that since consummation of the plan in 1949 there have been substantial increases in the market values of the common stocks of United Gas Corporation and of Middle South Utilities, Inc., distributed pursuant to the plan to holders of the preferred, second preferred, and common stocks of Electric (Pet. 23-25).[3] It ignores the facts that there have been tremendous changes in the capital structures of those companies during the 5-year interval through sales of securities and retention of earnings, and that there has been a concurrent rise in the market value of utility common stocks generally. It is of the essence of a common stock position that market values will fluctuate, whether such securities are purchased for cash or acquired in exchange for other securities.

Thus, according to the Dow-Jones Utility Averages, an investor in utility common stocks gen-

[3] The securities distributed to the common stockholders of Electric which had a market value of $90,000,000 to $100,000,000 in July, 1949, had a market value of approximately $175,000,000 as of July 1, 1954.

erally, who invested $185 in such stock on July 1, 1949, about the time the Electric plan was consummated, and retained his investment through July 1, 1954, would find that it had increased in value to approximately $312.[4] This does not mean that the sellers of utility stocks during the earlier period received less than their equitable equivalent in cash, or that the purchasers received an unfairly large number of shares for the investments they made. Similarly, a holder of a share of $7 Preferred Stock of Electric, with a liquidation preference of $189.71 and a redemption price of $199.71, received under the plan common stock with a then fair value equal to the fair value of the rights he surrendered. The valuation of his claim suggested by Electric's financial consultant was $185;[5] if he sold the stock received in exchange for it in July 1949 he would have received approximately $170 in cash at the low market price for the month, or $190 at the high market prices for the month, less the cost of sale.[6] If he retained the stock, its market value has increased along with the values of other common stocks to $332 as of July 1, 1954.

It is quite true, as stated by the court below, that

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[4] The Dow-Jones Utility Average was 34.66 on July 1, 1949, and 58.41 on July 1, 1954.

[5] The Commission did not place a dollar valuation upon the claim, but found that the shares of United and Middle South common stock to be issued in exchange for the Electric preferred stock constituted the equitable equivalent of the rights to be surrendered (R. 300, item 9, p. 67). Cf. *S.E.C.* v. *Central-Illinois Securities Corp.*, *supra*, 338 U.S. at 143.

[6] During July 1949 the United common stock sold at prices from $15⅞ to $17⅞ per share, and the Middle South common stock at prices from $14¾ to $16⅜ per share.

an intelligent estimate may turn out to be less accurate than an uninformed guess (R. 311). However, the claim of the petitioners that their guesses and those of their witness have been proven sound is not borne out by the facts. The relevant estimates involving prediction were the estimates of earnings applicable to the capital then invested in the enterprise. The Commission did not try to estimate market values five years after consummation of the plan, and such estimates would have had no bearing upon the questions at issue in the reorganization.

CONCLUSION

The case was correctly decided by the court below. The decision is not in conflict with holdings in other circuits, and there is no need for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1954.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 154.

CHRISTIAN A. JOHNSON and CAMERON BIEWEND Individually and as a Committee of the Common Stockholders of ELECTRIC POWER & LIGHT CORPORATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and ELECTRIC POWER & LIGHT CORPORATION.

BRIEF OF ELECTRIC POWER & LIGHT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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v.

SECURITIES AND EXCHANGE COMMISSION and ELECTRIC POWER & LIGHT CORPORATION.

BRIEF OF ELECTRIC POWER & LIGHT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Question Presented.

The petition for a writ of certiorari presents only a question of fact. That question is as to the quantum of compensation representing fair value for the services rendered by petitioners in a reorganization proceeding under Section 11 of the Public Utility Holding Company Act of 1935. It is an appraisal of the value of services which is involved, and nothing more. Whether it be value to the estate in reorganization, to the class of securities represented by petitioners, to the reorganization proceeding, to the COMMISSION, or to all four, the question is the same: What were the services worth?

Facts.

This petition involves one of the final steps in winding up the estate in reorganization of ELECTRIC.* The PLAN was carried out more than five years ago and ELECTRIC was dissolved.

The services of petitioners and their associates were rendered in connection with proceedings before the COMMISSION, the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit, and to a slight extent before this Court.** There were four classes of securities dealt with by the PLAN, including common stock. There were three principal representatives of the common stock. Petitioners as a committee constituted one of them. The common stock was also represented by the parent company of ELECTRIC, namely, BOND AND SHARE, which owned some other securities and had an adverse interest on claims, but the interest of BOND AND SHARE was predominantly common stock. In addition, the common stock was represented by the Sincoff Committee, which was active and aggressive in the proceedings.

The matters for which petitioners claim compensation or reimbursement are as follows (App. 217a):

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* For convenience, the following abbreviated terminology will be used in this brief:

BOND AND SHARE—Electric Bond and Share Company, the parent company of ELECTRIC.

COMMISSION—Securities and Exchange Commission.

ELECTRIC—Electric Power & Light Corporation.

PLAN—Plan for Compliance by Electric Power & Light Corporation with Section 11 of the Public Utility Holding Company Act of 1935, which was the subject of the proceeding in which the services were rendered which are the subject of the petition here.

** *In re Electric Power & Light Corporation*, 337 U. S. 903 (1949).

	Fees	Expenses
Burns, Blake & Rich, counsel....	$35,975	$2,770.06
P. Harold Peterson, witness....	12,189*	—
Becker, Berman & Odell, additional counsel	5,000*	1,049.79*
Committee expenses		7,563.10

All the items appearing in the column headed "Expenses" were allowed by the COMMISSION. The fee of Burns, Blake & Rich was allowed in the amount of $9,500. The fee of Becker, Berman & Odell, as additional counsel to the Committee, was disallowed as being duplicative and unnecessary. The compensation of Peterson, the witness, was disallowed on the basis that his testimony "did not in any way aid the Commission" (App. 244a) and his computations were "based upon fallacious analytical foundations" (App. 245a). After argument, the District Court held these findings of the COMMISSION to be supported by substantial evidence and to have been arrived at in accordance with legal standards, approved them as fair and equitable, and enforced them as part of the PLAN (App. 288a-292a). On appeal, the Court of Appeals affirmed (R. 305).

In general, the PLAN gave rise to two principal problems:

> (1) an analysis of the relative positions of the various classes of securities of ELECTRIC and the resulting determination of fair and equitable treatment for those securities under the PLAN; and
>
> (2) the settlement of various claims of ELECTRIC and its subsidiaries against its parent, BOND AND SHARE.

---

* We understand that the fee and expenses of Becker, Berman & Odell and $2,734.58 of the compensation of Peterson were paid by the Committee. These payments, however, are not included in the Committee expenses shown above.

Petitioners addressed themselves almost entirely to the first of these problems, although as their allocation arguments were successively rejected by the staff of the COMMISSION, the COMMISSION itself and the courts, they devoted increased attention to the claims settlement. But on both issues they failed to have a single point accepted by the COMMISSION or any court at any stage of the proceedings. Moreover, their objections were so unsubstantial that they were unable to secure a stay of the carrying out of the PLAN in the District Court, in the Court of Appeals or in this Court, although all three courts recognized that the carrying out of the PLAN would result in making the appeal almost academic.

POINT I.

The decision of the Commission, which has been enforced by the District Court and affirmed by the Court of Appeals, does not rest primarily upon the fact that petitioners were unsuccessful litigants. It rests upon judgment as to competence, effectiveness and hence value of services, and presents no question of law.

The failure to secure agreement with respect to their ideas regarding the PLAN is not the principal infirmity in the petitioners' fee claims. Their whole case rested on the testimony of one witness, Peterson, who was presented as an expert in the financial field and whose analysis and opinions regarding the PLAN should have been of assistance to the COMMISSION. But Peterson's testimony crumbled; and when it did, petitioners' case, resting on that testimony, collapsed.

This fact is important. Much is made in the petition of the fact that Peterson testified that the market for the securities which came out of the PLAN would go up and of the fact that the market, including the market for such securities, actually has gone up. But such testimony consisted of a mere guess. Since the market must go either up or down, compensation cannot rest on a mere guess as to the direction the market will take. A toss of a coin would furnish as firm a foundation for the right to be paid. An expert witness for common stock may be expected to testify that the market will go up, but an unsupported expression of optimism does not constitute expert testimony. As the Court of Appeals said below (R. 311):

> "It is common knowledge that an intelligent estimate may turn out to be less accurate than an uninformed guess, and a comparatively higher ultimate accuracy of a rejected forecast does not necessarily show that it was a contribution of any recognizable value at the time it was made available."

These considerations also apply to Peterson's unsupported guesses that the earnings of the companies whose securities were distributed under the PLAN would go higher than indicated by estimates made either by ELECTRIC's expert witness or by the COMMISSION.*

The only other witness tendered by petitioners was Johnson, one of the petitioners, and he stated specifically that in his testimony he accepted Peterson's earnings forecasts and Peterson's capitalization ratio of projected foreseeable earning power (Unprinted Record, Vol. Ia, pp. 5387-5388). He added nothing of his own.

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* It is significant that although the argument in the petition rests upon the alleged superiority of Peterson's testimony, that testimony, which is not lengthy considering its nature (Unprinted Record, Vol. Ia, pp. 5361-5382 and pp. 5431-5741), is not a part of the printed record.

It follows that *In re Engineers Public Service Co.*, 116 F. Supp. 930 (D. Del. 1953), appeal pending, upon which the petitioners rely so heavily, is not really in point. In that case, in stating the question Judge Leahy adopted the language of the fee claimant's brief to the effect that he had to decide whether "competent services" rendered in representing a class in a Holding Company Act reorganization "with respect to issues found by the Courts to be important and meritorious" are nevertheless non-compensable if they were not ultimately successful (116 F. Supp. at 935).

Moreover, that case is distinguishable upon another ground: as stated by Judge Leahy, the services there "were performed before this court and the appellate courts, as SEC itself has emphasized. Thus, this court is plainly in a position to evaluate the worth of these services just as well as the SEC" (116 F. Supp. at 946). This Court is certainly in no such position with respect to the present petition.

POINT II.

The cases cited by petitioners do not show that there is a question of law involved here—much less one deserving of review by this Court.

The case upon which petitioners rely most heavily, next to the *Engineers Public Service* case dealt with above, is *Heenehan* v. *Prudence Realization Corporation,* 108 F. 2d 103 (2d Cir. 1940). Petitioners' statement of this case (Petition, p. 17) is inaccurate. They say that in that case,

> "the Second Circuit took a position contrary to its present position (although Judge Chase, who rendered the opinion in the case at bar, dissented in the

> *Heenehan* case and therefor remains consistent in his view that the 'benefit' requirement is proper)."

The last sentence in the *per curiam* opinion in that case ends as follows (108 F. 2d at 104):

> "all that we now decide is that if the Superintendent's appeal was a benefit to the estate, the judge had power to make a commensurate allowance for the services rendered."

Judge Chase and the majority of the court were in accord that the benefit rule was applicable. The only difference between him and the rest of the court was that, on the record then before the court, he felt the question of benefit could be decided.

Milbank, Tweed & Hope v. *McCue,* 111 F. 2d 100 (4th Cir. 1940), has in it the following sentence (111 F. 2d at 102):

> "While, as stated by the court below, this controversy was of no benefit to the estate, we cannot say that it was groundless or lacking in good faith; and in view of the confusion then prevailing as to the law, we think that the services so rendered should be considered in fixing the compensation of counsel for the debtor."

In that case the issues litigated were novel issues under a new statute. Moreover, the instant decision of the COMMISSION is not at variance with the *Milbank, Tweed* decision; for here, as there, allowances to a losing party were actually made. Again, the question is solely the factual question of quantum.

Nor is *Smith* v. *Central Trust Co.,* 139 F. 2d 733 (4th Cir. 1944), inconsistent with the fee allowances to the petitioners in this case. The court there said:

> "* * * it is obvious that the failure of the reorganization and the dismissal of the proceedings are facts which should be considered in fixing the amount of the compensation, for the outlay must be made at the expense of the creditors who will have received no benefit from the efforts put forth, no matter how well intentioned they may have been" (139 F. 2d at 738).

In re Inland Gas Corporation, 73 F. Supp. 785 (E. D. Ky. 1947), also relied upon by petitioners, is merely a decision in which the court in a reorganization under the Bankruptcy Act fixed allowances on the basis of facts there before it. Since the instant case involves only the appraisal of services on the basis of other and different facts, the *Inland* case is irrelevant. Certainly it does not lead to the presentation of a question of law for review by this Court.

The petition cites (p. 17) Judge Hincks' opinion in *In re New York, N. H. & H. R. Co.,* 46 F. Supp. 214, 234 (D. Conn. 1942)* for the following statement:

> "To be sure, their effort to develop a plan which should recognize some equity for the old stockholders proved unsuccessful. Nevertheless, lack of success in advocacy on such an issue is a factor affecting the amount rather than the propriety of compensation."

We have searched Judge Hincks' opinion not only on the page cited but throughout, and have been unable to find this quotation. However, this decision, like the *Inland Gas* case, is again a decision primarily of factual significance —a valuation of services on the basis of particular facts

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* Mod. and aff'd in part, *sub nom. Warren* v. *Palmer,* 132 F. 2d 665 (2d Cir. 1942), rev'd in part, *sub nom. Manhattan Co.* v. *New York, N. H. & H. R. Co.,* 171 F. 2d 482 (2d Cir. 1948).

by the court before whom the reorganization proceeding was conducted.

We have disposed of the principal authorities relied upon by petitioners. The others are in the nature of make-weights and are even less persuasive than the ones dealt with above.

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: July 27, 1954.

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